United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7161

To be argued by
LEONARD GREENWALD

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P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket No. 75-7161

BOSTON M. CHANCE, LOUIS C. MERCADO, et al.,
Plaintiffs-Appellees,

—against—

THE BOARD OF EXAMINERS, et al.,
Defendants,

—and—

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,
Defendant-Appellant,

—and—

COUNCIL OF SUPERVISORS AND ADMINISTRATORS OF THE CITY OF NEW YORK, LOCAL 1, SASOC, AFL-CIO,
Intervenor-Appellant.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR COUNCIL OF SUPERVISORS AND ADMINISTRATORS OF THE CITY OF NEW YORK, LOCAL 1, SASOC, AFL-CIO

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STATEMENT PURSUANT TO RULE 28

A. Preliminary Statement

This appeal is taken by the appellant-intervenor, Council of Supervisors and Administrators of the City of New York, Local 1, SASOC, AFL-CIO (hereinafter "CSA"), the exclusive bargaining

representative of all employees of the Board of Education serving in supervisory or administrative positions in New York City (13a)[*] -- whether appointed under pre-1971 procedures or assigned or appointed under post-1971 court-ordered procedures -- and by the New York City Board of Education. The CSA was granted intervenor status by the district court on July 18, 1974.

The order appealed from was entered in the United States District Court for the Southern District of New York (Tyler, D.J.) on February 7, 1975. It modified two prior orders of the court of July 30, 1974 and November 22, 1974, and directed the Board of Education to carry out "excessing"[**] of supervisory personnel in New York City in accord with a formula imposing racial quotas upon the excessing process, thereby superseding and nullifying a provision in the collective bargaining agreement between the Board of Education and the CSA (and ratified by the CSA membership) which embodies the mandate of New York Education Law Section 2585 by directing that "excessing" proceed in reverse order of seniority. (The CSA contract provisions on excessing, submitted as an exhibit in the district court, is annexed hereto as Addendum A, infra, p. 52.)

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[*] References are to the joint appendix unless otherwise indicated.

[**] See page 5, infra, for a definition of "excessing."

B. Proceedings Prior to CSA Intervention in the Action

In 1970, the Plaintiffs herein brought an action to enjoin the Board of Education and the Board of Examiners from administering certain examinations qualifying persons for permanent appointment to supervisory positions in the City school system.*/ The district court (Mansfield, D.J.) preliminarily enjoined the Boards (on July 14, 1971) from conducting such examinations and from promulgating lists of persons eligible for permanent appointment on the basis of such exam procedures (330 F. Supp. 203 at 225).

Before the preliminary injunction was granted, the CSA was denied intervenor status in the action (decision denying the CSA motion is reproduced in the joint appendix, at 412a, et seq.).

The district court's reason for denying the motion was that unlike cases where union intervention was granted "to protect the job security of its members . . . there is no danger to the job security of the CSA members if the Chance plaintiffs would be successful in this action" (416a), since the action only was directed to the job qualifications necessary, in the first instance, for "permanent appointment" to supervisory positions (415a).

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*/ While a person could be given a temporary or "acting" assignment to a supervisory position, permanent appointment was impossible unless the acting supervisor took and passed the appropriate examination.

The preliminary injunction was affirmed on April 5, 1972 (Chance et al. v. Board of Examiners, et al., 458 F.2d 1167 [2d Cir., 1972], hereinafter "Chance I"). In affirming, this Court noted that the order merely enjoined examinations "found to have a discriminatory effect" upon permanent appointment of supervisory personnel and that the district "judge did not approve of a quota system for the appointment of supervisory personnel; he specifically rejected the idea" (458 F.2d at 1179).

Thereafter, a settlement agreement was reached between the plaintiffs and the Board of Examiners and a modified prelimary injunction was issued (Chance v. Board of Examiners, 496 F.2d 820 [2d Cir., 1974], hereinafter "Chance II"). Once again, a motion by CSA to intervene in the district court prior to settlement of the order was denied (496 F.2d at 822 n. 4).

The modified preliminary injunction, affirmed in Chance II, provided for an interim system of permanent appointments to supervisory positions, to remain in effect until a new exam system could be devised (496 F.2d at 823). The agreement and order "contemplates an interim system of appointment which includes a full examination" (496 F.2d at 824). Thus, three groups could be given permanent appointments: the first two groups consisting of persons who took and passed the old exams and are appointed to supervisory positions, and the third of persons who are appointed on an acting basis, have completed five months

service, and are licensed after an on-the-job evaluation (496 F.2d at 824).

C. The Proceedings Below

1. July 10, 1974 - July 31, 1974: The district court stays the Board of Education from inter-district excessing of supervisory personnel.

In the spring of 1974, discussions between the plaintiffs and the Board of Education and Board of Examiners were taking place concerning formulation of a prototype examination for future use in qualifying persons for appointment in permanent supervisory positions. CSA became aware, informally, that in addition to examination procedures, excessing was being discussed.

"Excessing" is a term of art deriving content from the New York Education Law Section 2585 and from the Collective Bargaining Agreement entered into between the CSA and the Board of Education.*/

Broadly speaking, excessing is the system whereby any supervisor who fills a position which is terminated (i.e., an "excessed person") is given certain rights regarding placement in another com-

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*/ The CSA contract provision embodies the Section 2585 mandate in its general preamble ("If a city-wide excess condition causes a layoff of staff in any licensed position, the provision of law will be followed to determine the staff member to be laid off . . . "), and then goes on in Rules 1 - 7 to provide specifically for specific situations in which literal application of the general rule would work an unnecessary hardship. See addendum, p. 52 infra.

parable position for which he or she is qualified:

1) The excessed person is given the right to fill a comparable vacancy occurring elsewhere in the system before any new hirees can be considered -- i.e., the right to relocation elsewhere in the system to prevent job termination when such vacancies exist.

2) The excessed person is given the right, upon the basis of seniority, to bump the least senior person holding a comparable position in a lay-off situation -- i.e., the right to require the central authorities to lay off the least senior person in the title rather than to lay off, whilly-nilly, any person, no matter how experienced, simply because that person has the misfortune to occupy the only job (out of other comparable jobs) which is being abolished.

The junior person who is laid off is then given the right to come back into the system and fill the first available vacancy in his area of expertise -- i.e., a right of preference in his license over new applicants.

3) The excessed person is given the right in some instances which do not create a real problem in a non-lay-off situation,*/ to bump a less

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*/ It would be rare, as a matter of actual practice, for an excessed supervisor of greater seniority to bump a junior person, when a similar job was available elsewhere in the system. All licenses are city-wide and presumably any supervisor is as competent to serve, for example, in Brooklyn as in Manhattan.

Even in the lay-off situations, rules exist to minimize "bumps." See Rules 1, 2, 4, 5 (infra, p. 52). Where bumping does occur, these rules give the person bumped the fullest possible personal choice in the selection of his new locale.

senior person from a job in a given locale, thereby requiring the junior person to relocate to another area.

Upon learning that excessing somehow had become an issue in this case, */ CSA moved to intervene, as representative of all supervisory personnel -- those licensed and appointed prior to 1971, those licensed and appointed after 1971 pursuant to the interim court-ordered procedures, and those "acting" (not yet appointed) pursuant to the court-ordered procedure (13a-14a) -- and therefore as one who should be heard on any issue affecting the rights of its membership. The motion was granted, over plaintiffs' opposition, on July 18, 1974 (1a).

The facts as to any excessing contemplated by the Board of Education for 1974-1975 were submitted by affidavit on July 30, 1974: first, no supervisor had lost a supervisory position in the city in the past 40 years on account of excessing; and second, only about 25 supervisors would be excessed in the coming year, and "all will be assured of other supervisory positions" within the system since "many times that number of vacancies occur regularly as a result of retirements and resignations" (90a-91a). The figure of 25 might vary by 10, and definitive information would be available in August (91a).

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*/ Throughout the district court proceedings, the plaintiffs never submitted any new pleading or affidavit directed to the excessing issue, relying instead upon legal argument made at the various "hearings" and in two legal memoranda submitted on July 25, 1974 and September 25, 1974.

The affidavit also noted that excessing according to seniority is a neutral practice which, among other benefits, actually curtails discrimination since the rules "insure against the possible exercise of 'discretion' [by local boards and the central Board] which might result in the excessing of supervisors of only one ethnic group" (94a).

Despite the fact that no lay offs were contemplated, plaintiffs took the position that any excessing "even if it does not contemplate being complete laid off" was prejudicial and the impact of this prejudice would fall on plaintiffs' class (47a). Plaintiffs had no factual basis for predicting the impact on their class, except "our hypothesis" that only people in plaintiffs' class would be in excess (55a). Plaintiffs also had no basis for calling excessing in the non-lay-off situation prejudicial, except their assertion that "even being shifted from one district to another . . . is considered to be a negative transfer by all people in the school system . . . " (56a).

The district court "seriously question[ed] whether anybody did make a showing that excessing is a problem which should be the subject of a sweeping order of this court or even a limited order . . . " (51a). The court also acknowledged that it had determined "there was no particularly adequate record factually as to just what excessing, if any, would be accomplished by the city school system this fall" (75a).

Over arguments from the CSA that until the facts developed, no order should issue because "we are dealing not only with an over-

regulated but a traumatized school system . . . " (58a-59a), the court enjoined any inter-district excessing (i. e,, the reassignment of a person whose position was terminated to a comparable vacant position in another district)(86a-89a). The court also enjoined the filling of such vacancies by new advertising (Ibid.).*/

The court concluded such relief was necessary because even without job loss, "many people would find burdensome" a job transfer from one area to another (70a); that it could be presumed that a goodly number of any persons so transferred might be in plaintiffs' class (77a); and "with that presumption there is also the presumption that if that were to occur it may have had its origins, to at least an extent, in the discriminatory practices heretofore struck down by orders of this court in this very case" (77a).

Since the facts were so unsettled, the court ordered the Board of Education to produce more detailed information on the actual facts by September 6, 1974 (88a).

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*/ Thus the order meant that certain districts had to retain and compensate supervisors whose functions were abolished and unnecessary, and other districts, with a need for personnel in identical openings, could not fill the vacancies either with those supervisors currently in excess in other districts or by recruiting new personnel.

2. August 1 - October 15, 1974: The prohibition against inter-district excessing is continued, the Board of Education reports on its anticipated excessing, and the court drafts and circulates a proposed order to create a preferred city-wide pool for excessed personnel.

On September 6, the Board of Education submitted a statistical summary of the excessing situation for 1974-1975 (147a).

The CSA analyzed the Board's figures and concluded that the total number of supervisory positions excessed was 72, but since there were 111 vacancies existing city-wide, there was a surplus of 39 vacant positions (128a). Additionally, the vacancies to be expected through retirements and resignations could be expected to add another 200-odd positions to be filled (128a). The CSA also analyzed the data by racial background and positions affected (134a-139a).

CSA further maintained that the Board's figures showed that of the supervisors potentially in excess, "35 are white, 10 black and 1 Hispanic." By eliminating the unlicensed supervisors,* only 9 minority supervisors would be subject to excessing transfers (129a).

CSA also believed that inter-district excessing "can significantly integrate the supervisory staff" on a city-wide basis by requiring transfer of excessed personnel according to the vacancies available without regard to race (131a).

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* At least half had failed the on-the-job court-ordered examination (see infra, p. 14).

The plaintiffs contended that 63 persons "would be excessed and/or terminated," and that of these 63 persons, 28 would be terminated (105a). Plaintiffs contended that since 17 of the 63 persons were minorities, there was a "gross disproportionate percentage" as compared to minority persons in the system as a whole (105a). Accordingly, the plaintiffs asked the court to prohibit any excessing of minority persons who gained positions since 1971, for a period of 3 years (107a).

The Board of Education believed that plaintiffs were in error in their calculations (110a). It submitted an affidavit stating that only the 15 unlicensed supervisors who were in excess, and whom the Board believed had no excessing rights, would be subject to demotion,* but that positions in the system were available for all licensed** personnel (143a). (See also 155a, where the Board again stated that "all excessed personnel in a year's period can be more than accommodated within the system due to supervisory vacancies.") The Board again cautioned that:

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* If no vacancy exists in the excessed person's license, then the person is able to claim any vacant position in any other license he holds or to bump a junior person in that other license. Since most supervisors also hold teaching licenses, demotion means job placement in the teacher's license.

** Both persons licensed under the old system before 1971 and after 1971 pursuant to the court-ordered system were deemed licensed for excessing purposes.

> It would be ludicrous under the plaintiffs' plans of no excessing to demote an experienced Assistant Principal in District A while in Distrct B there were advertisements for 5 such positions.
>
> (144a-145a)

The court believed:

> . . . it is self-evident that the City can still place some people around, it may not be their favorite job, but look at the vacancy column. That suggests on its face that there is room for maneuver here and that excessing is not quite as extreme in its application as one might think just by use of that terrible word.
>
> (113a)

In a legal memorandum submitted September 25, 1974, plaintiffs argued that "the Board's perpetuation of existing seniority rules places the entire burden of excessing on post-injunction appointees, who include an exceptionally high proportion of the supervisory staff's few minority members. At the same time, it preserves a complete insulation from excessing of all pre-injunction appointees" (p. 5). The CSA took exception to this analysis, stating it estimated that 15 to 20 of the excessed supervisors were tenured (7 years service) and that it was "advised that the 10 assistant principals (white) excessed by Community Board 23 are licensed, appointed and tenured" (150a).

Another "hearing" took place on October 10, 1974, at which the district court stated:

> I think the evidence in the record in this case is singularly inconclusive for me to make a final determination on the excessing problem.
>
> (160a)

The district court also noted that state litigation was pending in the New York Court of Appeals to determine at least one issue present in the case*/ and that the court felt it wise to await the outcome of the state case before issuing any order (170a).

The bulk of the argument was directed to whether local boards should be permitted to advertise for new supervisors as long as experienced supervisors who had been excessed from other districts were available to fill these vacancies (see, for example, 176a, 177a, 184a), and which categories of persons should have excessing rights.

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*/ This was the inter-district excessing question.

Three community school boards had contested the power of the central Board of Education to apply excessing rules to personnel appointed by their local boards and had refused to accept excessed personnel from other districts transferred into their districts to fill vacant positions. The remaining 28 local boards declined to intervene in the action. The New York City Board's Association, which had amicus curiae standing below, was not permitted to intervene in the state action, because it did not represent a majority of the local boards on the inter-district excessing issue. The state court held that the central Board does have the power to assign excessed personnel from one community school district to vacancies in another community district, without the consent of the receiving district. Matter of Supervisors v. Board of Education, 73 Misc. 2d 783, aff'd 42 App. Div. 930 (2d Dept., 1973), aff'd 35 N.Y. 2d 861 (1974).

In the district court below, the School Board Association continued to object to inter-district excessing on the same grounds which the state courts had rejected. See 30a-31a, 114a-115a, 200a. At one point, the School Board Association took the position that to preserve local board autonomy, the district court should maintain the freeze on inter-district transfers while permitting the boards to recruit new personnel for vacancies (173a-175a). This would have had the effect of requiring the excess persons to be held in useless positions and paid for not working, at the same time that vacant positions outside the excessed persons' districts were being filled with newly recruited personnel. It also would violate state law, as affirmed by the New York Court of Appeals.

The Board of Education was willing to give such rights to persons licensed and acting as well as persons licensed and already appointed*/ (182a).

At this proceeding, the court suggested permitting inter-district excessing to fill vacancies (but not to bump junior persons from positions) and the setting up of a pool of those excessed who cannot fill vacancies with a first right of return when a vacancy does open (185a, 187a). This was acceptable to the Board of Education, except as to a few "exotic titles" which were being completely eliminated, and the court suggested considering those on a case-by-case basis (188a).

One problem which remained were the 13 acting, unlicensed supervisors, who had either not yet taken or had taken and failed the court-approved exam. They had no excessing rights (190a), and the Board did not want such persons to be placed in a vacancy if their positions were terminated, because other districts might object to having to take persons who didn't have proper credentials (197a). See also CSA letter at 151a, pointing out that many local boards had developed reluctance to appoint supervisors who failed even the minimum court-approved standards.

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*/Once again, it must be recalled that "licensed" in this context means all persons licensed under the pre-1971 examination procedure and all those licensed after 1971 pursuant to the interim, court-approved exam method.

The plaintiffs asked the court, on the basis of a similar practice which prevailed until 1960, to divide the excessed personnel into 2 pools -- one for pre-1971 appointees and one for post-1971 appointees -- so that excessed personnel could be recalled alternately from the 2 lists (212a). The Board objected to this because, while dual lists may have been permitted some time in the past, "we have contractual agreements since that time which preclude that kind of situation" (213a).

On October 15, 1974 the district court circulated a proposed draft order "to resolve the excessing issue in this case" (215a). It contained a provision for two excessing pools, and various specific proposals for the filling of vacancies, on an inter-district basis, from these two pools.

The parties submitted their counter-proposals (223a-245a); however, these all became irrelevant in light of action taken by the district court on November 6, 1974, when a superseding proposal was circulated (247a).

3. <u>November 6 - November 25, 1974: The district court rescinds its prior order and orders that any excessing which may occur proceed only in accord with certain racial quotas.</u>

On November 6, 1974, the district court circulated a different proposed order setting up racial quotas for excessing purposes, and on November 8, the contents of that order were discussed. The CSA and the Board of Education took no position at that time, asking for

clarification of the terms (253a; 255a-263a).

The district court stated that it proposed this order as it could only be concerned "with entering orders which are designed to protect the basic orders in this case, which are designed to protect the plaintiffs' class" (255a). In response to an observation that, while the order protected the rights of blacks and Hispanics by use of the racial quotas, it gave no similar protection to any other groups, the court stated:

> . . . this court can only be properly concerned about the classes or persons who are involved in the plaintiffs' class in our federal suit. Therefore, Class C [white, oriental, etc.] is not our direct concern. . . .
> . . . we are concerned with doing nothing to undercut the gains which plaintiffs have achieved in . . . Chance v. the Board."
> (254a-255a)

The court proposed the order because "the time has come when the Gordian knot has to be cut" (273a). While "there is not as much information about excessing or possible excessing for the present or in the foreseeable future which is a matter of record," there was sufficient information from the data filed by the Board of Education (i.e., the affidavits filed July 30 and September 20 at 90a and 142a) "to indicate that the plaintiffs are entitled to some order to protect them in the rights under federal law they achieved in this litigation" (273a-274a).

The court stated that the order was designed to insure that plaintiffs' percentage representation among city supervisors did not diminish because of budgetary restraints requiring layoffs. The order also

affirmatively allowed the percentage representation of plaintiffs class to increase, as positions became available, by permitting an in-take of new minority personnel (276a).

CSA questioned whether the order not only gave protection to persons outside plaintiffs' class by giving preference to minority supervisors who passed the pre-1971 examination but also discriminated against post-1971 non-minority supervisors who passed the court-authorized exam procedure by placing them in the same non-preferred pool as pre-1971 non-minority persons (256a-257a). The court indicated its awareness of these problems (257a).

The November 6 proposed order went through a series of changes in detail before the final order of February 7, 1975; however, the basic concept of excessing according to racial quota, and not according to seniority of service, was maintained. In the meanwhile, the New York Court of Appeals decision, which the district court initially proposed to wait for, had come down (see p. 13, fn., supra). It approved inter-district excessing according to seniority and without the consent of the local boards.

The CSA initially proposed means whereby seniority could be maintained, while also giving the post-1971 class of minority supervisors protection from layoff without resort to quotas. See, for example, 318a-324a, where CSA proposed layoffs by seniority, the formation of a pool of persons excessed during 1974-1975, and a right

of reentry to fill vacancies occurring during that period in a manner that some racial balance within districts could be maintained.

After consultation with its membership, the CSA voiced its opposition to a racial quota system of excessing because the ultimate working out of the quota system, district by district, would operate to freeze minority supervisors in minority areas.*/ The minority supervisors in the CSA feared that the order would operate, in effect, to give them "a license which is invisibly but indelibly stamped 'black only'" (345a).

By letter of January 27, 1975, the CSA membership went on record as not "join[ing] in nor endors[ing] any of the proposed orders" (393a). The reason for this position was that:

> A majority of the minority group supervisors now serving reject the "remedy" being made available to them. They have in meeting after meeting advised their collective bargaining representative, the CSA, that they professionally and morally rejected the professional apartheid that the proposed order creates. (392a)

Before the final order was entered, the CSA asked the court to consider the Jersey Light & Power case, decided on January 30, 1975,

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*/As the Board of Education argued, if inter-district excessing were permitted to proceed by seniority, the effect would be to move black and Hispanic supervisors out of primarily minority areas, which are in a period of attrition, into vacancies occurring in mixed areas, which were gaining school population and vacancies in supervisory positions (343a; 335a).

in the Third Circuit, which reversed an order requiring layoffs in disregard of seniority to preserve racial quotas (344a).

The Board of Education also opposed racial quotas (see, for example, 311a, 335a). It reiterated that it would guarantee a position to any member of plaintiffs' class who had been excessed (311a). The Board also proposed to compensate any member of plaintiffs' class who was subject to the unconstitutional exam procedure by giving such person constructive seniority (358a-359a; 369a-373a). The Board pointed out that the court order did not focus on this group. Instead, it gave unwarranted preferential treatment to persons who were not eligible, for reasons unrelated to race, to enter the system before 1971; who took and passed the post-1971 court-approved, non-discriminatory exam; and who, therefore, suffered no discrimination at the hands of the system (370a-372a).

On February 7, 1975, the district court issued the order which is the subject of this appeal. Its provisions and workings, as the CSA understands them, are set out below in Point I.

ARGUMENT

POINT I

HOW THE ORDER WORKS: ANALYSIS AND PRELIMINARY CRITICISM

A. Analysis of the General Operation of the Order

All supervisors are divided into 3 groups according to race - IIA*/ (399a). Two quota calculations according to race must be made for excessing purposes: an intra-district quota, and a city-wide quota - III A & B (401a-402a). For convenience, the non-city-wide units referred to in II A (399a) are called districts, though they may have other designations in actual fact.

Each district must calculate its total number of supervisors of all races, then the number of blacks (group A) and of Hispanics (group B). It then constructs the ratio of blacks (A) and Hispanics (B) to the whole ($A/[A+B+C] + B/[A+B+C]$) - III A (401a). Thus if a district contains 100 supervisors (A + B + C), 20 are black and 5 are Hispanic, the ratio of blacks is 20% and of Hispanics is 5%.

Within each district, there is a school-by-school decision on how many positions will be discontinued (declared in excess). The most junior persons in the schools in these positions are placed in a tentative ex-

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*/ The roman numbers here refer to the paragraph designation used in the order.

cessing pool. The percentage of minority group persons in that pool cannot exceed the percentage that the minority group bears to the whole. No percentage for "others" (group C) is established,* so that the number of "others" in the pool can exceed any percentage they happen to bear to the total at any given time.

Thus: if 3 assistant principal (AP) positions are abolished intra-district, the intra-district excessing pool is three. With our 10% - 5% figures, only 10% of those 3 persons can be black and only 5% of the 3 persons can be Hispanic - III (401a-402a). Each percentage is less than 1 person, therefore, no person in the pool can be black or Hispanic.

If the 3 junior AP's in the tentative pool consist of 1 black, 1 Hispanic, and 1 white, then both the black and Hispanic APs must be returned to their schools and replaced with more senior "other" APs from those schools. The 3 "others" are now in excess.

If there are 3 AP vacancies in other schools in the same district, the 3 "other" APs then fill those vacancies. Under New York Education Law Section 2585 (as interpreted by the New York Court of Appeals) and the CSA contract (see addendum), the junior black, "other" and Hispanic who formed the tentative pool would have filled the vacancies. Thus the court order gives "bumping rights" to junior minority supervisors, allowing them to displace senior "other" personnel in a given locale so

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*" . . . class C ["other"] is not our direct concern . . . " (254a-255a).

that the senior person must move to another locale.

If there are no AP vacancies in the district, then the 3 "others" who are "in excess" come into the central, city-wide pool. That pool also has a quota for blacks and Hispanics - III D (402a).*/

Thus, if city-wide, the percentage of black supervisors is 10% and the percentage of Hispanics is 5%, the city-wide pool can contain no more than 10% blacks and 5% Hispanics - III (401a-402a).

If 5 people in 10 districts are in excess, the city-wide excessing pool totals 50. With a 10% - 5% ratio, the city-wide pool can contain no more than 5 blacks (10% of 50) and 2 Hispanics (5% of 50). If the districts have excessed 10 black supervisors, there is an overage of 5 black persons under the court's formula. Despite the fact that these 5 persons were properly "in excess" intra-district under the court's formula, they cannot be declared "in excess" city-wide. To do so would illegally increase the percentage of blacks in the city-wide pool, under the city-wide formula. Therefore, they either must given positions back in their home districts, thereby bumping "others" who occupy these positions,(who then replace them in the city-wide pool); or, if there are no "others" to bump, they must be "swallowed"**/ because they cannot bump other blacks.

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*/ In actuality, approximately 20% of the supervisors in New York City are black or Hispanic.

**/ To be "swallowed" means that a person must be retained in the position he formerly occupied even though the position has been abolished and he has no function to perform.

The situation is entirely different with the "others" in the city-wide excessing pool. They need not be returned to their districts in this situation, because no matter how many "others" are contained in the excessing pool, there is no quota to protect them against layoffs. Thus, if 5 "others" were in excess, instead of the 5 minority members in the situation above, the "others" would not be retained in the system -- they would be laid off or demoted in license.*/

B. Criticism of the Working of the Order

In a non-layoff situation the order will lock the minority supervisors into positions in minority districts (which are the areas where most excessing for transfer purposes is going to occur) while removing from those districts the "other" supervisors, who will be then assigned to existing vacancies in other districts which already contain a higher percentage of non-minority population and supervisory personnel.**/

The minority supervisor will be protected from removal from his home district. The price for that protection will be his bitter knowledge that because of his race, a paternalistic court has decided

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*/ i.e., if an AP also holds a teacher's license, he or she reverts to the former license upon being excessed from the present license.

**/ See CSA affidavit and charts, at 129a-139a, which demonstrate that the school districts with vacancies -- into which excessed personnel would be shifted -- are the predominantly "other" districts, and that excessed personnel would come from the so-called minority districts.

he will be best off practicing his profession only in the sympathetic home district which hired him: that he is too fragile professionally to withstand the kind of city-wide transfers his non-minority colleagues are routinely subject to.*/ He will have been given a "black only" license from his home district which stamps him suitable for employment in that district, but otherwise of such dubious ability that he may not be able to function elsewhere and thus must be given greater protection against transfer than the court deemed necessary for his white counterpart.

Additionally, by prohibiting the Board from inter-district excessing -- according to the collective bargaining agreement and state law -- without regard to race, the court has also stayed the integration of supervisory personnel on a city-wide basis for the duration of the order.

If excessing for inter-district transfer purposes were allowed to proceed according to state law and the collective bargaining agreement terms, the demographic and political realities in the city school system

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*/ The fact that minority group supervisors can consent to inter-district transfers under the order does not alter the premise of second-class status underlying it. Even here, the court deemed it necessary to accord greater protection to the minority supervisor than to his white counterpart in an identical situation, presumably to shield him from the normal operations of a system which has heretofore assumed that any supervisor is competent to fill any position in his license throughout the city.

would insure a mixture of the races city-wide, without any decline in the percentage or number of minority group persons in supervisory positions city wide. See affidavit of Frank C. Arricale, Executive Director of Personnel, Board of Education, especially at 145a-146a; and CSA affidavit, especially at 130a.

In the layoff situation, wherever a higher percentage of minority personnel is in excess under the court's formula, one of two things occurs:

If the improperly excessed minorities return to their districts and bump more senior "others," who are then laid off, the school system will be forced to replace a person of greater on-the-job experience with one of less experience. This result, as we argue infra, was neither contemplated by Congress nor consistent with existing case law.

If the improperly excessed minority supervisors cannot bump "others" and therefore must be "swallowed" simply to maintain the racial quota, the school system is forced to allocate already reduced and scarce fiscal resources to pay for totally non-essential services. of Examiners

One could argue that this is the tax which the Board must pay for past discrimination in hiring. However, should the worst impact of this tax fall upon the pupils in the system who will be short-changed on other services in order to pay for "make-work" for minority supervisors -- even those who may have been licensed pursuant to court-

approved procedures and who therefore were not even kept from this "rightful place" by the pre-1971 discriminatory exams? See argument, infra.

On an individual level, the quota system of excessing produces little equity and great injustice: Assume that in District A, an Hispanic supervisor in an exotic title* is in excess since his job is abolished. The district is 10% Hispanic and his is the only position in excess district-wide. The district excessing pool is therefore 1. His placement in the pool violates the court order since only 10%, not 100%, of the pool can be Hispanic under the formula.

Under the order, the Hispanic supervisor cannot be excessed from his position although he no longer has any pedagogical function to perform. If, despite the violation of the intra-district quota, he could be placed in the city-wide pool, he could bump a more senior "other" in another district, if one exists. But if no bumping is possible, he will be returned to his district to fill and be paid for his abolished job. An "other" in his same position would be excessed.

Assume the two most junior APs in charge of a subject being phased out of the curriculum in a given district are a black and an "other." Both passed the pre-1971 exam and were licensed and

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* Titles which were necessary at prior times, such as the AP chairman of Ancient Languages or Early Childhood Supervisors, etc., but which are no longer in demand. See 188a.

appointed under the old system. The "other" is 5 years older than the black and has 12 years seniority; the black has 7 years seniority. There are 30% black supervisors in this district. One of these AP positions is in excess and it is the only excessed position in the district. There are no comparable positions elsewhere in the city.

The "other" with 12 years seniority must be excessed in order to maintain the racial quota, even though the junior black suffered no adverse consequence from the discriminatory examination and though the senior person obtained no seniority advantage, vis à vis the junior on account of it.

Assume the two most junior APs in a district are "Circular 30" appointees who got their positions after 1971. The "other" is two years older than the minority AP and was appointed 2 years earlier. Only one AP job is eliminated in the district, giving an excessing pool of 1. There are 40% black supervisors district-wide.

The senior "other" will be excessed even though the minority supervisory suffered no discrimination in job appointment, having qualified under a non-discriminatory exam system approved by the court in this action, and even though the "other" gained no seniority advantage through the pre-1971 exam. If there is no position available in other districts which can be filled without affecting the racial quota, he will be terminated.

Assume a district is excessing one AP position. The two most junior APs both were "actings," assigned pursuant to Circular 30 on the same day. The "other" passed the non-discriminatory job evaluation approved by the court in this action and obtained license and appointment. The black failed the on-the-job procedure but has reapplied (see 401a). The excessing pool is one. The percentage of black supervisors in the district is 60%.

Under the court formula, the black cannot be in excess. The "other" must be excessed to preserve the ratio, even though he is more qualified to hold the position when judged by the results of the non-discriminatory testing procedure by the court in this case.

Assume there are 99 out of 100 black AP supervisors in a district, with one job in excess. The most junior AP is black. The only white AP in the district is a Circular 30 appointee, who is 3 years senior. The senior white will be excessed, though the supervisory staff is 99% black, since 99% of 1 is still not 100%, and therefore no black can be excessed under the formula.

We submit, and will demonstrate, that there is no requirement in the Constitution, statutes, or decisional law, that in a tight-budget situation, the employer -- contrary to state law and a duly ratified collective bargaining agreement -- is obliged to retain personnel in unnecessary jobs to maintain a racial quota; or to lay-off the most experienced personnel and retain the least experienced, even though

the least experienced suffered no discrimination in hiring or in seniority expectations because of any discriminatory hiring practice.

We further submit that no principle of federal law or policy requires an employer to retain minority personnel in their home districts on the basis of race in the non-layoff situation in violation of a duly authorized collective bargaining agreement and state law, where no diminution of any minority group's total city-wide percentage will occur through inter-city transfers -- simply because it is asserted that "even being shifted from one district to another . . . is considered to be negative transfer by all people in the school system" (56a). And, especially where the facts demonstrate that the court imposed intra-district quotas impede, rather than promote, integration on the supervisory level.

We also submit that the district court erred in its basic premise: that, as a matter of law, any seniority provision -- conceived without discriminatory intent and neutral on its face and as applied in practice -- ipso facto denies equal protection whenever any kind of past discrimination in hiring practices has been established.

POINT II

THE DISTRICT COURT ERRED IN HOLDING THAT BECAUSE DISCRIMINATION IN HIRING HAD BEEN ESTABLISHED IN CHANCE I AND II, THEN, IPSO FACTO, THE CSA COLLECTIVE BARGAINING AGREEMENT PROVISIONS REQUIRING EXCESSING IN INVERSE ORDER OF SENIORITY DENIED EQUAL PROTECTION TO THE PLAINTIFFS' CLASS.

A. The CSA Collective Bargaining Agreement Seniority Excessing Provisions Were Neither Devised Nor Applied In Order to Discriminate Against Plaintiffs' Class, or to Discriminate Against Any Minority Supervisors.

The record is devoid of any finding that the CSA and/or the Board of Education adopted the contract provision governing excessing on a seniority basis (see addendum for the text of the contract provision) to discriminate against minority supervisors or to thwart the court decrees in Chance I and Chance II.

The contract provision is based upon New York Education Law Section 2585, which has been or the books in various forms at least 40 years.

The purpose of the law -- as the CSA and the Board of Education continually stated below -- was to protect any supervisor from job loss through abolition of his or her position when a comparable vacant position existed elsewhere in the system -- i.e., in the non-layoff situation. In the layoff situation, the provision also protected the more senior person from job termination when comparable positions filled by junior

persons existed. The basis for this is the widely held assumption that length of on-the-job experience should be the decisive factor in choosing between otherwise equally qualified persons when budget cut-backs require the elimination of supervisory jobs.

In addition to these purposes, the CSA contract provisions are designed to protect the job security of supervisory personnel from arbitrary action of their employing boards. Seniority provisions such as these

> . . . more than any other provision of the collective bargaining agreement . . . affect the economic security of the individual employee. . . . In industries characterized by a steady reduction in total employment, the employee's length of service is his principle protection against the loss of his job.
>
> "Reflections on the Legal Nature and Enforceability of Seniority Rights," 75 H. L. R. 1532, 1535 (1962)

Given no finding by the district court of discriminatory intent or actual discriminatory use of the seniority excessing provisions, there is no basis in existing case law -- except the Watkins decision*/ cited by the district court (396a) for invalidating the CSA contract provision on equal protection grounds on a class basis. See Jersey Central Light v. Local Unions, ___ F. 2d ___ (3rd Cir., 1975), slip. opin. at 28: "We are not concerned here with allegations or proof that the

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*/ Watkins v. United Steelworkers Local, 369 F. Supp. 1221 (E.D. La., 1974), appeal docketed No. 74-2604 (5th Cir., 1974).

Company's plant-wide seniority system is by its express terms and intent presently discriminatory."

Cases like United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir., 1971); United States v. Hayes International Corp., 456 F.2d 112 (5th Cir., 1972); Thornton v. East Texas Motor Freight, 492 F.2d 416 (6th Cir., 1974); Quarles v. Philip Morris, Inc., 279 F.Supp. 505 (E.D.Va., 1968) are inapplicable factually. They either invalidate seniority systems which were designed to keep incumbent minority members in inferior jobs they were originally assigned for racial reasons or which otherwise deny "black workers the benefit of their tenure." "Employment Discrimination: Statistics and Preferences under Title VII," 59 Va.L.Rev. 463, 480 (1973). See generally "Seniority Discrimination of the Incumbent Negro," 80 H.L.Rev. 1260 at 1264 (1967), for a description of the kinds of seniority systems which have been held discriminatory.

B. This is not a Consent Situation: The Orders in Chance I and Chance II Do Not Cover the Excessing Problem. Even If They Did, the CSA Was Not A Party to Them, Having Been Denied Intervenor Status in Those Actions.

The orders litigated in Chance I and II were not intended to cover any situation except discriminatory hiring of new personnel. No one understood them to do anything except prohibit the Board of Education from using the pre-1971 exams (devised by the Board of Examiners) as

the basis for future permanent[*] appointment of supervisory personnel.

The best proof of this is the reason given by the district court in Chance I for denying intervenor status to CSA: that CSA had no interest in the subject matter of the action, as the action concerned the constitutionality of the standards for appointment to permanent positions devised by the Board of Examiners -- a body which plays no role in excessing decisions. Moreover, the district court specifically stated that job security of CSA members would in no way be jeopardized if the Chance plaintiffs were successful since the action did not involve matters of CSA representation like salaries, working conditions and the like (414a, 416a). All that non-discriminatory future hiring would do, if the Chance plaintiffs were successful, was add new minority supervisors to the existing supervisory population and to the CSA membership.

Indeed, no one could have intended the Chance I and II actions to cover layoff excessing since when those cases were pending and decided, no layoff situation existed. No permanently appointed supervisor had been terminated or reduced in rank in 40 years, and since 1949, only 3 were "taken out of license" (90-91a, see p. 7, supra).

Nor were the Chance I and II cases concerned with non-layoff licensing, i.e. job relocation to prevent termination by preference

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[*] Pre-1971, temporary appointment could be made of persons who had not taken or passed the examination, but even these "actings" had to take and pass the old exam to qualify for permanent appointment.

over new appointees. This kind of excessing had taken place according to the CSA contract provision throughout the litigation, without the plaintiffs designating it a problem in this proceeding or otherwise calling it to the court's attention.

Since the orders in Chance I and II were only intended to relate to new hirings, and in any event since CSA was precluded from participating in the formulation of those orders by being denied intervenor status before they were formulated, this is not a case controlled by Patterson v. Newspaper Mail and Delivers' Union, et al., ___ F. 2d ___ (2d Cir., 1975), Docket No. 74-2548, slip. opin. 2415. In Patterson, this Court was merely called upon to approve or reject a voluntary agreement, ratified by all parties, calling for quotas at non-entry level positions. The Court was careful to acknowledge that "we have suggested that court ordered relief involving minority employment goals be confined to entry level positions" (slip. opin. at 2428, emphasis in the original). It merely held that these cases did not "support rejection of the agreement that has been reached in this case" (Ibid.). See also, Jersey Central Light & Power, supra, slip. opin. 17-24.

C. The District Court Order Covers a Different Class than the Chance I and II Plaintiffs. Moreover, the Original Plaintiffs Never Established that They also Represented this New Class.

The minority supervisors who had permanent appointments prior to 1971 -- i.e., those who took and passed the pre-1971 examinations -- were not part of the plaintiffs' class in Chance I and II or covered by the orders in that litigation. They are included in plaintiffs' class in this case. The district court order makes no distinction between minority personnel appointed pre- or post-1971.

Post-1971 minority personnel appointed pursuant to court-ordered procedures were covered by the orders in Chance I and II and were members of plaintiffs' class in those proceedings because they had a common interest in the subject matter of that litigation. Any minority person who became eligible for a supervisory appointment after 1971 was a party in interest, because of his interest in securing an examination procedure which would not illegally discriminate against him in obtaining permanent appointment. This was an interest shared with pre-1971 "actings" who could not secure permanent appointment due to the existing exam system. The interest which united plaintiffs' class was in invalidating the discriminatory examination procedure blocking their permanent appointment; and not in the emoluments of office which resulted once an appointment had been secured (see decision denying intervenor status to CSA, 412a, et seq).

In point of fact, the "acting" supervisors who secured positions pursuant to court-ordered procedures after 1971 were denied certain "benefits of office" given to other supervisors performing the identical function. There was, for example, a severe differential in pay for identical work, depending on whether a supervisor was "acting" or appointed. This differential treatment was not litigated or changed through the efforts of the Chance I and II plaintiffs, even though it negatively affected their class. It was remedied in the collective bargaining process through CSA efforts on behalf of its total membership, which secured equal pay treatment for all supervisors, no matter how or when appointed (see 195a-196a; and paragraph 3, CSA affidavit, 14a-15a).

During the proceedings below, the CSA argued that, as the duly elected and authorized bargaining agent for all supervisors, it now represented the plaintiffs' class for purposes of securing the "benefits of office," like wages, working conditions and excessing rights.

Since the CSA had demonstrated it represented all supervisors, no matter how or when appointed or assigned, for collective bargaining on wages and job conditions, including excessing, CSA argued that it should be permitted to represent its own membership for the same purpose in any action which might affect such matters. (See CSA affidavit in support of motion to intervene, 14a-15a.) The plaintiffs

disputed this, maintaining the CSA did not represent its own minority group members on the excessing issue (25a).

The district court apparently operated on the assumption that plaintiffs' class was identical in membership and interest for purposes of the excessing issue, as well as for the purposes for securing a non-discriminatory examination procedure leading to permanent appointment. We submit that the definition of the class was improper under Rule 23, F.R.C.P. and under general labor law principles of collective representation.

An identity of interest on the part of minority job applicants in securing a non-discriminatory exam system for appointment to a supervisory position does not automatically mean that once appointment is secured, every minority job-holder now has the same interests in the working conditions, wages and seniority, as every other minority job-holder. The pre-1971 minority supervisor may have an interest in having seniority govern his excessing rights; and a majority of the post-1971 appointees represented by CSA for collective bargaining purposes vigorously opposed the quota system for inter-city transferring on professional and moral grounds (see supra, p. 18). The error in permitting this case to proceed on the basis of the original class is, therefore, grievous since in giving protection to persons not properly constituting a class, the order in point of fact protects persons who actually opposed the relief granted.

Moreover, the CSA was duly authorized and certified as bargaining agent through a recognition process in which authorization cards were solicited and collected from plaintiffs' class in each license area. In the absence of any showing by plaintiffs that the CSA recognition and certification as bargaining agent for all supervisors violated the rights of the minority supervisors, then it was a violation of public policy to invalidate, in effect, the results of that election by denying the CSA the right to represent its own membership on an issue covered by its own collective bargaining agreement. In so doing, the court authorized fragmentation of a bargaining agent's duties and responsibilities, as well as artificially and prematurely terminated its statutory duty as exclusive bargaining agent -- without following the statutory scheme set out in Sections 206.1 and 207 of the New York Civil Service Law, and in Rules and Regulations, Public Relations Employment Board, Sections 202.3 and 201.3, governing a change of bargaining representatives.

The order appealed from must be vacated on the ground that the definition of the class was improper under Rule 23, F.R.C.P. and under the general principles of collective representation.

D. Seniority Excessing According to the CSA Collective Bargaining Agreement in the Non-Layoff Situation Violates no Federally Protected Right; Hence the District Court Erred in Superseding that Agreement and Ordering Excessing to Proceed Instead on the Basis of Racial Quotas.

Prior to the entry of the order below, three New York state courts had ruled upon the validity of inter-district excessing according to inverse seniority, as provided in the CSA contract, and had held that (see supra, p. 13, n.) it was proper. The official syllabus in the New York Court of Appeals case report describes how such excessing took place:

> In June, 1971 the Chancellor of the Board had issued to community school boards and community superintendents rules which concerned excessing, transfer and layoff of pedagogical and nonpedagogical personnel, and which provided, inter alia, that, if a city-wide excess condition caused a layoff of staff in any licensed position, such layoff was to be on the basis of the last person appointed in the license on a city-wide basis; that the person laid off was to be placed on a preferred list, and that the Board had the responsibility for placing supervisors who were excessed from a school or community district office and could not be accommodated by their own district, within budgetary limitations and if vacancies existed within the city. In January, 1972 the State Commissioner of Education approved the Board's excessing guidelines as consistent with sound educational policy. Thereafter, because of cutbacks in the money available, several community school districts declared certain positions in excess and, after determing which individuals in each license area had the least seniority, the Board validated them as excess personnel, temporarily assumed the payroll expenditures for them pending their assignment to appropriate vacancies, and issued a letter to community school boards, advising them of the availability of such excessed personnel and reminding them that

> such personnel had a claim to a vacancy in license where there was no regularly appointed person assigned to that budget line. When the response to that letter proved insufficient, the Board issued directions for the assignment of personnel in excess in five license areas to community school districts which either had vacancies in the appropriate positions or individuals holding such positions on substitute licenses.
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> (Matter of Supervisors, supra, 35 N.Y.2d 861)

The district court has prohibited this state court sanctioned inter-district excessing where it would decrease the percentage of black and Hispanic supervisors in any given local area, even though it would not decrease their percentages on a city-wide basis.

Inter-city excessing without regard to race, but based on seniority, is designed to prevent job loss when comparable vacancies exist and to give the unit declaring the excess the ability to retain the most senior person in the title -- legitimate business purposes. The senior person is protected, on account of his length of on-the-job experience -- and for no other reason -- from being removed from a position in his home district. Some degree of discomfort may exist in any transfer, but the junior person transferred is protected by specific union rules against unnecessary discomfort.*/ Moreover, any position in a given title is

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*/ Rule 2 provides that intermediate supervisors who are excessed from a school in one district have a right of return if an appropriate vacancy occurs in that school in a year's time. Rule 4 provides that "to the fullest possible extent," excessed supervisors must be placed in their own districts, rather than being assigned to other districts. Rule 5 provides that excessed supervisors can be assigned to temporary vacancies in their home districts "to minimize movement of personnel." Rule 6 directs the central Board in making a new assignment "where possible [to take] the wishes of the supervisor . . . into account . . . " when he or she must be transferred from their home district. See addendum, infra, p. 52.

identical to any other position in that same title in all emoluments and pay, so a transfer is not a demotion.

The plaintiffs maintained that somehow, an inter-district transfer was a negative burden (47a, 56a, supra, p. 8). The district court agreed that "many people would find [the inter-district transfer] burdensome" (70a, supra, p. 9). This was the only claim and finding of prejudice made below as to excessing resulting only in inter-district transfers.

We have found no authority which holds or suggests that where certain racially neutral measures are business necessities of the sort here described, they can be prohibited from occurring on a seniority basis (as prescribed by state law and union contract) and ordered to be undertaken on the basis of racial quotas set by the court simply on a showing that some people may find the practice burdensome. Even the Watkins decision, supra, relied on by the district court in support of its order, does not speak to this question. Indeed, when inter-district excessing for transfer purposes was first described, even the district court "seriously question[ed] whether anybody did make a showing that [non-layoff inter-district] excessing is a problem which should be the subject of a sweeping order of this court, or even a limited order . . ."

The order appealed from must be vacated as to inter-district excessing on the ground that plaintiffs never established that inter-district transfers to protect job loss for existing supervisory staff violated

any constitutional (or statutory) rights of their class.

Moreover, according to CSA submissions in the court below, the overwhelming majority of CSA minority supervisors "protected" by the district court's order regarding inter-district excessing did not deem this protection to be in their own best interest. See p. 18, supra.

As we stated above, the district court never determined who was authorized to represent the class (i.e., minority supervisors occupying permanent positions in the system) its order was going to affect -- the attorneys for the original plaintiffs or the CSA. If indeed the order does not represent the interests of a majority of the minority persons now serving in supervisory positions, it should not have been entered in the first place.

This is especially so because it is clear from the facts of record below that inter-district transfer for relocation purposes gave the central Board the ability to increase the racial integration of the supervisory staff through the city. See p. 10, supra. The CSA minority membership therefore opposed the plaintiffs' plan and the ultimate court order on the ground that any court order preventing this from occurring and keeping them in their home districts on the basis of race was professional apartheid and gave them, in effect, a "black only" license. See p. , supra. It is further irony that -- in addition to being unnecessary to protect the minority supervisor from any racial discrimination in trans-

fer -- the order actually prohibits overall racial integration for 3 years. It thus fosters the very kind of discriminatory employment practice condemned by the court in Allen v. City of Mobile, 331 F. Supp. 1134, 1138 (D. Ala., 1971), aff'd 466 F. 2d 122 (5th Cir., 1972), where the city was enjoined from assigning black police officers only to black complaints and cases, and white officers of equal qualification only to white complaints and cases.

At the least, this Court should hold that the CSA contract provisions regarding excessing in the non-layoff situation are valid and do not violate any federal law or policy; and that the order appealed from should be modified insofar as it is inconsistent with the CSA contract provisions for inter-district excessing in the non-layoff situation.

E. Seniority Excessing in the Layoff Situation Done According to the CSA Contract Provision Violates No Federally Protected Right, Even Where There Has Been Discrimination in Hiring Historically. Even Assuming That It May in Certain Instances, the Relief Ordered Below Is Not the Proper Remedy.

Two circuit courts have already held that layoffs in inverse order of seniority violates no federally protected right even where, historically, there was discrimination in hiring. Jersey Light & Power, supra, and Waters v. Wisconsin, 502 F. 2d 1309, 1314, 1317-20 (7th Cir., 1974). One district court is contrary [illegible] the decision is on appeal. Watkins v. United Steelworkers, supra.

In that decision, the panel also indicated that the

One circuit court has held that a district court has power -- on a case-by-case basis -- to award constructive seniority to any person who establishes that he or she failed to achieve their "rightful place" on account of discriminatory hiring practices which prevented the individual from achieving proper seniority. Meadows v. Ford Motor Co., 510 F. 2d 929 (6th Cir., 1969). Another circuit has held that the district court does not even possess this limited remedial power. Franks v. Bowman, 495 F. 2d 398 (5th Cir., 1972), cert. gr. The issue of awarding constructive seniority on an individual basis will soon be resolved by the Supreme Court. However, it must be recalled that the Board of Education offered to award constructive seniority on an individual basis in this case (supra, p. 19) and that this relief was rejected by the plaintiffs (378a-379a). The Meadows relief is not the remedy fashioned by the district court below, and the correctness of that type of relief is not the issue being challenged by CSA on appeal in this case.

The opinions in Jersey Light & Power and Waters v. Wisconsin, supra, contain a comprehensive discussion of legislative history and case authority, which we adopt. Additionally, we commend to the Court's attention a scholarly collection and analysis of the pertinent cases in 88 Labor Relations Reporter (BNA), Fair Employment Practice, Decisions of the Courts, etc., No. 15, Section 6A, entitled "Laying Off Employees Pursuant to a Seniority System: The Problems of Discrimination."

We submit that the Jersey Light & Power and Waters cases, supra, were correctly decided; that this Court should adopt them and reject the result reached in Watkins and by the court below; accordingly, that it must vacate the district court's order. The Jersey Light & Power and Waters decisions are clearly in accord with prior decisions in this Circuit and other circuits whereas the Watkins decision is directly contrary to them.

This Court made it abundantly clear in United States v. Bethlehem Steel, supra -- a case involving a discriminatory departmental seniority system and not a bona fide plant-wide system -- that it was not according the

> discriminatorily assigned employees . . . "special seniority rights" or "super seniority rights." Their seniority rights will be no greater than that accorded more fortunate employees. Both groups will bid against each other for vacancies on the basis of plant-wide seniority; an earlier hired white employee will have greater seniority rights than a later-hired black.
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> (446 F. 2d at 661)

In accord: Bridgeport Guardians v. Civil Service, 482 F. 2d 1333 (2d Cir., 1973).

These decisions accord with the usual view of the fair employment guarantees in Title VII regarding the "bona fide seniority exemption." It is generally accepted that Congress was against what it regarded as reverse discrimination emanating from the preferment of minority

workers "off-the-street," who had no prior contact with the employing enterprise, over other employees with employment seniority. See, e.g., Gould, "Seniority and the Black Workers," 47 Tex. L. Rev. 1039, 1046 (1969); 80 H. L. Rev., supra, at 1271-72; "Business Necessity under Title VII of the Civil Rights Act of 1964," 84 Yale L. Rev. 100 (1974).

In Local 189 Papermakers v. United States, 416 F. 2d 980, 994 (5th Cir., 1969), cert. den. 397 U.S. 919, the court states:

> It is one thing for the legislature to require the creation of fictional seniority for newly hired negroes, and quite another for it to require that time actually worked in negro jobs be given the equivalent status with time worked in white jobs. To begin with, requiring employers to correct their pre-act discrimination by creating fictional seniority for new employees would not necessarily aid the actual victims of the previous discrimination. . . . In other words, creating fictional employment time for newly hired negroes would comprise preferential rather than remedial treatment.
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> (emphasis in the original)

In Thornton v. East Texas Motor Freight, supra, 497 F. 2d at 420, the court refused to back-date seniority for minority workers on the ground that before the date they qualified for the positions, the discriminatory hiring practices "could not have blocked their employment." In accord: Bing v. Roadway Express Co., 485 F. 2d 441, 452 (5th Cir., 1973); Quarles v. Philip Morris, supra, 279 F. Supp. at 519, where the court states:

> Negroes hired after January 1, 1966 are not included in the class. Since that time the company has hired employees in all its departments on a non-discriminatory basis. Thus, even though Negro employees hired in [a given] department after January 1, 1966 had limited transfer privileges, these restrictions are not unfair employment practices. The departmental seniority of negroes hired after January 1, 1966 is predicated on a bona fide seniority system that did not result from an intent to discriminate on account of race.

In short, the courts have never required that incumbent "others" be removed from their jobs so that non-incumbent minority workers can be hired to replace them. Nor have the courts*/ required that the seniority rights of "others" be disregarded and nullified for the benefit of more junior minority employees -- even where there has been historical discrimination in hiring. The courts have held that such action would clearly prefer the minority worker because of race, and would subvert the basic principle of all bona fide seniority systems -- a result specifically prohibited by Sections 703(h) and (j), of Title VII, 42 U.S.C. Sections 2000e-2(j). See 80 H.L.Rev., supra, at 1271.

The Meadows case, supra, has addressed a different issue and has held that relief in the form of constructive seniority may be possible in the case of an individual person who can establish that he or she was actually injured on account of the past discriminatory hiring practice.

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*/ With the exception of the district courts in Watkins, supra, and in this case.

But see Franks v. Bowman, supra, holding that the district court has no power to grant even this limited relief.

The district court order not only grants class-wide -- not individual -- relief in a situation where it has always been denied, it goes even farther. The order appealed from accords preferential treatment in the layoff situation to persons who have not suffered any adverse consequence from the pre-1971 discriminatory hiring practices, either because they passed the exam when they first became eligible to take it and secured permanent appointment,* or because they only became eligible for assignment and subsequent appointment after 1971 when the discriminatory examinations had been discontinued.

As was argued in the district court, because the class has substantially increased over the years of litigation,** some of the post-1971 appointees may have been ineligible for supervisory positions before Chance I and II because they may still have been in high school when the pre-1971 discriminatory hiring occurred (370a). Nonetheless, the district court order not only gives these persons super-seniority rights vis-à-vis pre-1971 "others," it also gives these persons preferential rights as against post-1971 "other" employees, who qualified for

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*/ As was stated above, these persons were not included in the original class in Chance I and II.

**/ Which, incidentally, was specifically cautioned against by Judge Feinberg in Chance II (496 F. 2d at 825).

personnel on racial lines. Rather, it reflects a considered

their positions on the basis of a non-discriminatory hiring procedure, and who therefore gained no seniority advantage from the old discriminatory exam. True to the fears initially expressed by the district court below, when it was still reluctant to enter any order directing affirmative action, the order "end[ed] up penalizing people who had nothing to do with perpetuating or inducing the discrimination" (111a).

The only minority persons who could have been adversely affected by pre-1971 discriminatory hiring practices are those who were actually old enough, and otherwise eligible, for supervisory positions before the discriminatory practices ceased. Thus, a minority supervisor who was state certified pre-1971, but who failed a discriminatory exam or was improperly discouraged from taking one, mayhave been affected by the pre-1971 discrimination and may be entitled to relief -- but only if the Meadows, supra, rationale is accepted; not under Franks v. Bowman, supra.

The basic fallacy of the Watkins decision, and the decision below, is that by ordering class relief, each gives artificial seniority to a person who has not achieved seniority equal to an older member of the "preferred" group, even if the minority worker has failed to do so simply because he is younger in age. The further fallacy of the district court-ordered relief is that it gives artificial seniority to a younger minority person as against "others" in his own age group, even though they achieved employment on an equal, non-discriminatory basis. Neither

of these results is necessary to remedy past discrimination; and neither is permissible under Title VII or Section 1983.

The order appealed from must be vacated because it gives illegal preferential treatment to minority supervisors who suffered no discrimination at all, by any standards, from the pre-1971 examination procedures.

CONCLUSION

For all the foregoing reasons, the order appealed from must be either modified in the respects argued in Point II(2) and (3) or vacated in all respects, with a direction that individual plaintiffs are free, if they qualify and so choose, to apply for relief on an individual basis in the event the Supreme Court adopts the Meadows, supra result and reverses the Fifth Circuit in Franks v. Bowman, supra.

Respectfully submitted,

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Administrators of the City of
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Of counsel:
GRETCHEN WHITE OBERMAN

Dated: April 29, 1975

AFFIDAVIT OF SERVICE BY MAIL

State of New York
County of Kings

DOCKET NO.: 75-7161

Louis Pinto, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 1967 71st Street Brooklyn, N.Y.

That on the 2nd day of May, 1975, deponent served the within Brief for Council of Supervisors and Administrators, Local 1 upon W. Bernard Richland; Corporation Council, City of New York; Municiple Build. Center Street, New York, N.Y. 10007

Elizabeth B. DuBois, c/o Legal Action Center of City of New York 271 Madison Ave, New York, N.Y. 10016

Deborah Greenberg, c/o Legal Defence & Education Fund, Inc.; 10 Columbus Circle, New York, N.Y. 10019

Rebell & Krieger; 230 Park Ave, New York, N.Y. 10017

Attorney(s) for the Appellants & Appellees in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

COUNTY OF KINGS

Sworn to before me,

Louis Pinto

This 2nd day of May 1975

William J. Bachman

WILLIAM J. BACHMAN
Notary Public, State of New York
No. 30-5137735
Qualified in Nassau County
Commission Expires March 30, 1976

CSA COLLECTIVE BARGAINING PROVISIONS CONCERNING EXCESSING

L. Excessing Rules

The following excessing rules shall be adhered to in all divisions. If a city-wide excess condition causes a layoff of staff in any licensed position, the provisions of law will be followed to determine the staff member to be laid off, without fault and delinquency with the understanding that said member of staff is to be placed on a preferred list. Such excessed staff member shall be the last person appointed in the license on a city-wide basis.

Rule 1. Within the school, district, bureau or other organizational unit, the supervisor with the latest date of appointment within license will be the first to be excessed, irrespective of probationary or permanent license. A supervisor on probation should not be excessed more than once during his probationary period of service.

Rule 2. An intermediate supervisor who has been excessed from a school in a district to another school in the same district may request an opportunity to return to the school from which he has been excessed if within a year a vacancy should occur in his license in that school. Such a request will have priority over any other transfer or appointment to that vacancy.

Rule 3. All leave-of-absence time for which salary credit is granted will not affect the earliest date of appointment for purposes of excessing. All other leave-of-absence time without pay or time lost because of resignation and subsequent reappointment will affect the earliest date of appointment.

Rule 4. Supervisors in excess in a school unit or district office under the jurisdiction of a community board must be placed in vacancies within the district to the fullest degree possible. For school units, districts, or bureaus under the jurisdiction of Central Board, supervisors in excess in a school or bureau must be placed in appropriate vacancies within the district or central office.

Rule 5. To minimize movement of personnel, excessed supervisors may be assigned when no other vacancies exist in the districts, within the district to appropriate openings resulting from leaves of absence without pay.

Rule 6. The Central Board has the responsibility for placing supervisors who are excessed from a school or community district office and cannot be accommodated by their own district, within budgetary limitations and if vacancies exist within the city. Where possible, the wishes of the supervisor will be taken into account in his placement by the Central Board.

Rule 7. When a supervisory position in Central Headquarters is abolished, the occupant of that position is excessed, and he shall be granted the same rights for placement as a supervisor who is excessed from a community district.